No. 78-1789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. McCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

PETITIONER'S REPLY BRIEF ON THE MERITS

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April 10, 1981

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PETITIONER'S REPLY BRIEF ON THE MERITS

I. REPLY TO RESPONDENTS' BRIEF

Respondents in their brief propose two questions (p. ii), neither of which adresses the questions presented by Petitioner's application and brief. As far as we can understand Respondents' questions and argument, it appears that Respondents are asking the Court to permit them to secure an increase in rates without any consideration of the effect of the *Natural Gas Act,* 15 U.S.C. §§ 717, *et seq.,* on the contractual

relations of the parties.[1] Respondents' argument is instead a litany of legally irrelevant statements embellished by rhetoric, some exaggerated and some even untrue, all designed to evoke undeserved sympathy for the Respondents' cause. Respondents' brief discloses no ground upon which the judgment of the court below can be sustained.

We have concluded that we should analyze the Respondents' arguments to point out their defects in at least the following respects:

(1) Respondents' assertions that Petitioner purchased gas from the United States government (Respondents' brief, pp. 4, 9, 10, 41, 43).

(2) Respondents' claim that the facts were wrongfully withheld from them (Respondents' brief, pp. 4, 5, 10, 25, 27, 28, 31, 32, 37, 40, 43).

(3) Respondents' assertion that any recovery by them would be paid out of Petitioner's "abundant corporate assets" (Respondents' brief, pp. 5, 6, 7, 23, 25, 27-28, 30, 31, 32, 33, 41).

(4) Respondents' assertion as to what the Commission and the courts had held as to the jurisdiction of the Louisiana courts (Respondents' brief, pp. 4, 14).

(5) Respondents' assertions as to quantum of recovery (Respondents' brief, pp. 15, 16 *et seq.*, 18 *et seq.*, 22, 25, 41, 49).

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[1] One of Respondents' questions does include a reference to the amount of the recovery, a question involved in the grant of *certiorari*.

(6) Case authority relied on by Respondents is inapposite.

We will discuss the above-enumerated features of Respondents' argument and in Part II will respond to the brief *amicus curiae* filed by Atlantic Richfield Company ("Atlantic").

(1) Petitioner Bought No Gas From The United States Government.

Respondents repeatedly refer to "prices paid to the United States government for the government's . . . gas," or similar language.

Contrary to Respondents' assertions, the Louisiana Court of Appeal, reversing the trial court, held as follows (J.A. 36):

> "We recognize that the theory of ownership and classification of lease royalty payments as rent as urged by defendant is in accord with the prevailing state law and federal decisions on this issue. [citing cases] We nevertheless find it inappropriate to accept the technical and restrictive interpretation on the term 'purchase from another party seller' relied on by defendant under the circumstances shown in this instance."

The Supreme Court of Louisiana refused to review this decision of the Court of Appeal (J.A. 50, 57, n. 4). So far as concerns the decisions of the Louisiana courts, it is finally settled that Petitioner did not buy any gas from the United States government. Rather, the Louisiana courts concluded that the phrase "purchase from another party seller" should be "broadly construed" in the interest of seller to be activated by the payment of rent royalty (J.A. 35-38), erroneously relying upon *Eastern Petroleum Corp.* v. *Kerr-McGee*

Corp., 447 F.2d 569 (7th Cir. 1971), discussed *infra* pp. 12-13.

(2) Petitioner Withheld No Facts As To Triggering From Respondents.

Respondents' assertions that Petitioner withheld facts regarding the triggering of the favored nation provision are based on their assumption that Petitioner knew, when it commenced payment of royalties to the government in 1961, that such payment of royalties triggered the favored nation provision. No evidence supports this assumption. Petitioner could not have known in 1961 that the Louisiana Court of Appeal in 1978 would construe the term "purchase" in a fashion inconsistent with its commonly accepted meaning.

The fact is that while representatives of Petitioner were negotiating in 1961 and 1962 with officials of the government as to the value of the gas for purposes of royalty settlement, Petitioner requested of its counsel answers to a number of questions regarding Petitioner's rights in such negotiations with the government, including an opinion regarding the question of whether rent royalties would trigger the favored nation provision. Counsel responded in a memorandum, the last paragraph of which stated (Def. Ex. D-6, R 2708):

> "Answering your final question as to the effect of such royalty payments by the Arkansas Company, I do not see how it could have any effect on settlements under fixed price leases. It would not be finally determinative under market value leases; but it could be one circumstance that would tend to show a higher market price in the field and thus might have an influence on royalty terms

> under such leases. *In my judgment, it would have no effect in the way of triggering any favored nations increases.*" [Emphasis added.]

Respondents testified that one or more of them asked representatives of Petitioner whether it was "buying" gas at a higher price than under the contract involved here. The answer was in the negative, as it should have been based on counsel's legal opinion. We say with complete confidence that the evidence that Petitioner denied that it was "buying," gas from the government was based on a good faith understanding that the payment of royalty did not constitute a purchase. It is significant in this connection that in its Order Denying Application for Waiver of Filing Requirements, issued November 5, 1980, the Commission found (App. 14a-15a):[2]

> "[O]ur own review of the record before us leads us to conclude that Arkla could have reasonably assumed that the government royalty payment did not trigger the indefinite price escalator in the contract with the Hall group."

Respondents insisted in the trial court, the Court of Appeal and the Supreme Court of Louisiana that Petitioner had concealed the facts from them. The trial court ignored this contention,[3] and the Louisiana Court of Appeal held (J.A. 41):

> "The trial court did not make a finding that defendant was guilty of fraudulent concealment, and

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[2] The order is attached to this Reply Brief as an Appendix.

[3] A contention not passed on is rejected under Louisiana law. *Villars v. Faivre*, 36 La.Ann. 398 (1884); *Soniat* v. *Whitmer*, 141 La. 235, 74 So. 916 (1917).

> we find the evidence is insufficient to support such an allegation."

The Louisiana Supreme Court held (J.A. 65):

> "The trial court made no finding that defendant fraudulently concealed or misrepresented facts relating to its activation of the favored nations clause. The court of appeal, in affirming the trial court's determination on this issue, found the evidence insufficient to support plaintiffs' allegation of fraud. We have reviewed the record and it is our opinion that the determination made by the lower courts on this issue is correct."

The findings of both the Commission and the Louisiana courts confirm that Petitioner acted in good faith and withheld no facts from Respondents.

(3) Respondents' Assertion That Any Recovery By Them Would Be Paid Out Of Petitioner's "Abundant Corporate Assets" Is Erroneous.

Respondents in at least 14 different parts of their brief have assured this Court that their recovery would be from Petitioner's "abundant corporate assets" and at the expense of its stockholders. They have never given any legal authority for the statement that this case would be different from all other cases of an increased price by a utility to a supplier where the rule is that a utility's rates are fixed in an amount which will permit it to recoup its expenses and receive a return on the value or cost of its assets devoted to the public service. *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944).

Respondents' understanding in this respect appears to be directly in conflict with the position of the Solici-

tor General of the United States and the Commission, who say in their brief filed in this cause as *amici curiae* (pp. 15-16):

> "Moreover, the Commission is not now in a position to make a post hoc determination regarding the reasonableness of the rates that respondents would have charged Arkla in the period between 1961 and 1972.[12] The Commission would, in any event, be precluded by Section 5(a) of the Act (15 U.S.C. 717d(a)) from approving retroactive ratemaking. Under this Court's decisions in *Montana-Dakota* and *T.I.M.E. Inc.,* the Louisiana courts are similarly precluded.
>
> "This result is consistent with the statute's central purpose of benefitting consumers by holding down wholesale prices. The actual consumers of the gas, Arkla's past customers, have already paid for the gas, and any surcharges that Arkla may be permitted to levy in order to recover for the damages awarded to respondents would fall on a different group of customers. *Cf. Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* 341 U.S. at 254; *T.I.M.E. Inc.* v. *United States, supra,* 359 U.S. at 491 (Black, J., dissenting).
>
> "[12] In its decision on respondents' waiver application, the Commission refused to speculate 'as to how our predecessors would have acted nineteen years ago' (Amici Supp. Mem. App. 15a)."

(4) Respondents' Statement That FERC And The Federal District Court Have Affirmed Jurisdiction Of The State Courts Is Erroneous.

In their "Statement of the Case," Respondents have averred (pp. 11, 14) that both the United States District Court for the Western District of Louisiana and

the Commission have held that the Louisiana state courts have jurisdiction over the interpretation of the contract between the parties.

Respondents are in error. What the federal district court held was that it did not have removal jurisdiction and what the Commission held was that it need not exercise jurisdiction because the filed rate doctrine barred the cause of action (App., p. 13a, n.19):

> "We declined to assert our primary jurisdiction in the May 18, 1979 order in large part because we perceived no significant effect upon our regulatory responsibilities resulting from an interpretation of the favored nations clause favorable to the Hall group. Had we not believed that the filed rate doctrine banned a rate increase (through damages) for the 1961-1972 period, we no doubt would have had serious misgivings about declining jurisdiction over the question of contract interpretation."

The District Court opinion on removal is an illustration of "the well-pleaded complaint rule," formulated in *L. & N. R.R. Co.* v. *Mottley,* 211 U.S. 149 (1908), that jurisdiction must be determined on the face of the plaintiff's complaint. The District Court found that Respondents' complaint anticipated Petitioner's defenses under the *Natural Gas Act.* See Judge Rubin's opinion, J.A. 160, at 165. The opinion did not hold that the Commission was without jurisdiction, nor did it hold that the state court had jurisdiction.

(5) The Illegality Of The Quantum Of Recovery Permitted By The Court Below.

The Supreme Court of Louisiana (J.A. 62) and the Louisiana Court of Appeal (J.A. 44, 45) directed, in

remanding the case to the Louisiana district court for calculation of recovery, that the price of the gas be fixed at the amounts, per unit of gas, which Petitioner had paid to the United States as royalty, and that further adjustments be made in accordance with the contract provision requiring that "due consideration shall also be given to a comparison of all other pertinent provisions of the two contracts."

The resulting judgment of the district court (J.A. 69), affirmed by the Louisiana Court of Appeal (J.A. 72), is for an amount per unit of gas at about twice the maximum rate permitted by the Commission; and is pending upon Petitioner's third petition to this Court for *certiorari* in No. 79-1896.

This judgment proves conclusively that the Louisiana courts are either not willing or not able to determine correctly the effect and applicability of the *Natural Gas Act* on the transaction before the Court in this case.

The question may be complicated, but not too complicated to be explained. Ordinarily, almost invariably, a natural gas well produces wet gas—gas containing liquefiable hydrocarbons—which by a relatively simple plant operation can be extracted from the gas (usually at an extraction plant) and sold separately as hydrocarbon liquids. A natural gas well also produces hydrocarbon liquids (usually called distillate or condensate) which drop from the gas in a separator at or near the wellhead. This was the situation as to the gas bought by Petitioner at the wellhead from Respondents in the Sligo Field and as to the gas produced by Petitioner under its lease from the federal government.

Petitioner's purchase contract with Respondents (J.A. 87 at page 91) contains the following provision:

> "Gas sold hereunder shall be delivered to Buyer, and title thereto shall pass to Buyer at the outlet side of Buyer's metering equipment located at or near each of the wells subject hereto."

It also contains in the price provision (J.A. 98, 99) a Section 8(B) which provides:

> "The prices hereinabove in this Section 8 provided to be paid by Buyer to Seller shall constitute full payment for all gas delivered hereunder and also for all liquefiable hydrocarbons and other products delivered with such gas, it being understood and agreed that any and all products whatsoever recovered or recoverable from the production delivered hereunder by means of any type of processing operation subsequent to delivery shall be the property of Buyer or its assign without any obligation to make further payment to Seller for such products ...."

A further provision of the contract (J.A. 100) gave Petitioner the right, but not the obligation, to purchase condensate or distillate that might be recovered at the well separator. Payment was to be made for such distillate as Petitioner purchased at prices prevailing from time to time. In the operation of the contract, some of the distillate was bought and some was not.

The royalty settlement with the United States government was provided by the lease contract as interpreted and applied by the United States Geological Survey (J.A. 121 at page 135) to require 16⅔ percent of the value of the liquid hydrocarbons extracted from the gas at Petitioner's Sligo gasoline plant, 16⅔ percent of the market value of the distillate, and 16⅔

percent of the market value of the gas remaining at the gasoline plant after extraction of liquefiable hydrocarbons.

The Louisiana courts have disregarded the *Natural Gas Act* and the pricing provisions of the contract and have thereby given the Respondents a retroactive rate increase which is about twice the maximum price fixed by the Commission for the gas involved.

The Louisiana Court of Appeal in its judgment pending on petition for *certiorari* in No. 79-1896 (J.A. 72, 78-81) recognized that the contract did in fact provide a wellhead price for the wet gas. Thus that price is the one that is governed by the Commission prescribed ceilings. Respondents have represented (Respondents' brief, pp. 47-49) that each of the Louisiana courts and the Commission have held that Respondents sold Petitioner hydrocarbon liquids and residue gas at severable prices. There is no such holding in the decisions of the Louisiana courts and the Commission has now retracted its erroneous statements relied on by Respondents in their brief served on March 30, 1981. The retraction is made in the brief of the Solicitor General and the Commission filed in No. 79-1896 as *amici curiae* and served on Respondents in November, 1980, p. 5:

> "Gas may be sold at the mouth of the well (the wellhead) or after the removal of liquids or other impurities at processing plants. At the wellhead, the Commission has jurisdiction over the entire gas stream, including those molecules later processed into liquids. See *Mobil Oil Corp.* v. *FPC,* 483 F.2d 1238, 1248 n. 23 (D.C. Cir. 1973), citing *Permian Basin Area Rate Cases,* 390 U.S. 747, 820 n. 111 (1968). With respect to sales at the plant,

however, once liquids have been extracted the Commission's authority extends only to the gas itself (*i.e.*, the residue gas).

"The Commission's previous conclusion (78-986 Amici Br. App. 13a; 78-1789 Amici Br. App. 13a) that 'the damages does not exceed applicable area ceiling rates,' was premised upon the erroneous belief that Arkla's contract with respondents was based on sales at the plant, and not at the wellhead. As a result of this incorrect interpretation, the Commission eliminated from its calculations those damages that apparently represented payment for removable liquids, and found that the damages awarded for the actual gas (*i.e.*, residue gas) were within the area ceiling rates. That premise is now undermined by the ruling of the Louisiana courts (Pet. App. 116a-117a) that Arkla's contract with respondents provided for sales of the entire gas stream at the wellhead, including removable liquids."

(6) Case Authority Relied On By Respondents Is Inapposite.

Respondents in their brief rely heavily on two cases, *Eastern Petroleum Corp.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971), and *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961).

A. *Eastern Petroleum Corp.* v. *Kerr-McGee Corp.*

We feel that we should refer to the only case of which we are aware that construed the payment of a royalty under an oil and gas lease as triggering a favored nation provision. *Eastern Petroleum Corp.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971). This case is cited by the Louisiana Court of Appeal (J.A. 37-38) and is relied on by Respondents, but is clearly distinguishable. *Kerr-McGee* involved the pricing of

intrastate helium gas sales and not interstate sales of natural gas for resale. Therefore, the case is totally inapposite with respect to this transaction which is governed by the *Natural Gas Act* and the Commission's regulations thereunder.

The *Kerr-McGee* court's interpretation of the contract was influenced by the fact that Arizona state law was unsettled on the issue of whether helium royalty payments involved a purchase. 447 F.2d at 573. Under the *Natural Gas Act,* it is a well-settled principle of federal regulatory law that a royalty payment does not constitute a purchase of natural gas (See Petitioner's Brief, p. 40, *et seq.*). The case is also factually distinguishable because the parties had previously interpreted their favored nation provision as being triggered by the payment of royalties and the clause explicitly referred to "leases." 447 F.2d at 570-71, n. 4.

B. *Pan American Petroleum Corp. v. Superior Court*

The basic question in *Pan American* was whether the pipeline's case should have been initiated in federal rather than state court. Since the plaintiff was seeking merely to be refunded excess payments above the established rate on file with the Commission, there was simply no statutory jurisdiction over the case in the federal courts. The case only involved the well-pleaded complaint rule of federal court jurisdiction. *Pan American* did *not* concern the determination of the level of rates at which natural gas could have been sold for resale in interstate commerce, which is the issue in the instant proceeding. *See Socony Mobil Oil Co.* v. *Brooklyn Union Gas Co.,* 299 F.2d 692 (5th Cir. 1962), *cert. denied,* 371 U.S. 887 (1962).

II. REPLY TO BRIEF OF ATLANTIC RICHFIELD AS *AMICUS CURIAE*

The attempt of Atlantic to distinguish the present case from this Court's decision in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951), is notably unsuccessful.

Atlantic, relying on the following excerpt from the *Montana-Dakota* opinion contends that the Court "recognized that had the Plaintiff brought its claim as a common law action in a court of competent jurisdiction, such an action would have been maintainable and the filed rate doctrine would have posed no problem" (Atlantic Brief, pp. 6-7):

> " 'If the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act. Such an action would have been maintainable if no Federal Power Act had been enacted. Before the Act, petitioner would have had no statutory right to a reasonable rate, but it did have a common-law right not to be defrauded into paying an excessive or unreasonable one.' (341 U.S. at 252)."[4]

The language quoted and relied upon by Atlantic does not support Atlantic's contention. The paragraph does no more than state that prior to enactment of the *Federal Power Act* an action at common law for active fraud and deceit was maintainable.[5] A reading of the

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[4] The *Federal Power Act,* 16 U.S.C. §§ 824, *et seq.,* and the *Natural Gas Act* are identical with respect to the Commission's rate jurisdiction.

[5] This Court pointed out, 341 U.S. at 254, that "[damage] is an essential element of remediable fraud. 'Deceit and injury must concur.' [Citation omitted.]" In the same way, injury is an essential element of a remediable breach of contract.

decision as a whole clearly discloses that the common law action did not survive enactment of the *Federal Power Act*. The following excerpt from the Court's opinion makes it certain that its holding was that plaintiff's claims were not maintainable in any forum, 341 U.S. at 251-52:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in *a judicial forum* its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even *a court* can authorize commerce in the commodity on other terms.
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, *the courts* can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable." [Emphasis added.]

The Court, in the above excerpt from its opinion, is clearly speaking of any judicial forum, state or federal. The proposition that no cause of action for a rate increase exists separate from the regulatory statute is confirmed by the Court's decision in *T.I.M.E. Inc.* v. *United States,* 359 U.S. 464 (1959).

A further answer to Atlantic's argument is found in the leading precedent for the filed rate doctrine, this Court's decision in *Texas & Pacific R.R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907). That case, like the case at bar, was brought and tried in a state court

by a shipper who asserted a common law claim in its pleading that the carrier had denied it a just and reasonable rate and who sued for a refund. The defense of the carrier was that the charge made was in accordance with the carrier's tariff on file with the Interstate Commerce Commission and effective under its rules.

The trial court found that the rate was indeed unjust and unreasonable, but gave a judgment sustaining the carrier's defense. The judgment was reversed and a decree entered for the shipper by the state court, which held that the carrier had demanded and coercively collected from the shipper freight charges in excess of a reasonable compensation for the transportation.

This Court in an elaborate opinion rejected the shipper's claims for reasons which have since become known as the "filed rate doctrine," and which was applied by this Court in *Montana-Dakota*. The decision shows clearly Atlantic's error. *Texas & Pacific*, like the present case, was brought in a state court to enforce a common law claim and was defended on federal grounds. There is no procedural difference between the *Texas & Pacific* decision and the present case.

Atlantic's attempt in its brief to distinguish the case of *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F.2d 388 (5th Cir. 1947), *cert. denied*, 332 U.S. 770 (1947), is even less successful. Counsel distinguishes that case from the case at bar "because the Fifth Circuit found no breach of contract."

It is clear from the court's opinion that Memphis Natural charged Mississippi Power a contract rate

which failed to reflect operation of the favored nation provision (which in that case lowered rather than raised rates). That is exactly what the Louisiana courts have held in this case amounted to a breach of contract, that is, failure of Petitioner to pay the contract price as modified by the favored nation provision. Memphis Natural in the earlier case deviated from the modified contract rate and Petitioner in the present case (according to the Louisiana courts) likewise deviated from the contract rate. The Fifth Circuit Court of Appeals in *Mississippi Power* held that without approval and implementation by the Commission, the favored nation provision could not be given effect; the Louisiana courts in the present case have held exactly to the contrary.

CONCLUSION

For each and all of the reasons set forth in Petitioner's Brief on the Merits and Reply Brief, the judgment of the court below should be reversed and the court below directed to order dismissal of Respondent's amended petition.

Respectfully submitted,

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April 10, 1981

APPENDIX

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY
REGULATORY COMMISSION

FILED RATE DOCTRINE
CONTRACT DAMAGES

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., George R. Hall and J. David Hughes.

Docket No. RI76-28

ARKANSAS LOUISIANA GAS COMPANY

v.

FRANK J. HALL, *et al.*

ORDER DENYING APPLICATION FOR WAIVER OF FILING REQUIREMENTS

(Issued November 5, 1980)[1]

On May 24, 1979, Frank J. Hall, *et al.* (the Hall group) filed an application pursuant to Section 154.98 of the Commission's[2] Regulations requesting a waiver of the notice requirements contained in

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[1] This order has been modified to reflect an *errata* notice issued November 6, 1980, correcting an order posted on November 5, 1980.

[2] The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the Federal Power Commission (FPC); when used otherwise, the reference is to the Federal Energy Regulatory Commision.

Section 4(d) of the Natural Gas Act.[3, 4] In support of its request, the Hall group asserts that timely compliance with Section 4(d) was impossible because Arkansas Louisiana Gas Company (Arkla) wrongfully concealed from the Hall group the facts which would have made such compliance possible. The effect of granting the waiver would be to allow the Hall group to collect from Arkla for the period September 1961-October 1972, a rate for gas in the Sligo field higher than that on file with the Commission. For the reasons given below, we reaffirm our conclusion that the filed rate doctrine applies and deny the waiver.

PROCEDURAL HISTORY

A. *State Court Proceedings*

On July 18, 1974, the Hall group brought a breach of contract suit against Arkla in a Louisiana court.[5] The suit concerned the proper interpretation of a favored nations clause contained in a 1952 gas purchase contract between the Hall group and Arkla. It was the Hall group's contention that royalty payments made to the United States Government by Arkla since 1961 had triggered the clause.

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[3] In addition, the Hall group filed an additional petition seeking waiver on May 29, 1980. This petition requests no additional relief.

[4] The Hall group's request for waiver is presented in the alternative. The first request, and one that would moot the waiver question, is for a finding by the Commission that the award of damages in a contract action by the Louisiana courts does not involve this Commission's jurisdiction.

[5] *Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo Parish, Louisiana, No. 225,699.

The Louisiana State District Court rendered a verdict in favor of the Hall group. The court found that the favored nations clause had been triggered by the U.S. royalty payments and awarded damages to the Hall group for the period from October, 1972, through December, 1975. The court concluded that it could not award the Hall group damages for the period prior to October, 1972, because such an award would constitute a rate change, and the courts do not have authority to authorize rate changes. Damages for the 1972-1975 period were appropriate, according to the court, because the Hall group was a small producer during that time, and under the Commission's Regulations, small producers were not required to make rate change filings.[6]

On review, the Louisiana Second Circuit Court of Appeal affirmed.[7] The Louisiana Supreme Court subsequently modified the decision of the lower courts, holding that the Hall group was entitled to recover for the 1961-1972 period.[8]

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[6] These findings are consistent with the view of the Commission as expressed in orders issued both before and after the Louisiana District Court's opinion.

[7] The Court of Appeal also recited the fact that the trial court had not found fraud and stated that the record would not support a finding of fraud. *Hall* v. *Arkansas-Louisiana Gas Company*, 359 So.2d 255 (La.Ct.Ap. 1978).

[8] *Hall* v. *Arkansas-Louisiana Gas Company*, 368 So.2d 984 (La. 1979) *cert. denied*, Oct. 1, 1979, —— U.S. ——. Arkla's Petition on rehearing of the denial of certiorari to the decisions of the Louisiana Court of Appeal is now pending in the United States Supreme Court. *Arkansas Louisiana Gas Company* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978. In *Arkansas-Louisiana Gas Company* v. *Hall*, Sup. Ct. No. 78-1789, filed May 29, 1979, Arkla sought certiorari of the Louisiana Supreme Court's order assessing liability for the

B. *Commission Proceedings*

On September 11, 1975, Arkla filed in this docket a petition for a declaratory order construing the favored nations clause. The Commission declined to resolve the contractual dispute, stating in its March 8, 1976, order that "[i]t has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court . . . ."[9] Arkla appealed this decision to the D.C. Court of Appeals,[10] and while the appeal was pending, the Commission moved for an order remanding the record for further consideration. The Commission's request was granted by the court on May 25, 1978.

On remand, the Commission, in an order issued May 18, 1979, adhered to its earlier determination to decline to exercise jurisdiction. It did so, however, for a reason different than that enunciated in the March 8, 1976, order. The Commission stated that it "believe[d] the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous."[11] Rather, the Commission stated, the decision to defer should turn on whether the Commission finds that the issue involves a matter of "primary jurisdiction." In making this determination, the Commission stated, it would look to the following three factors:

1961-1972 period. In Sup. Ct. No. 79-1896, Arkla has sought certiorari of the judgment entered by the Louisiana district court on the remand of the damages issue.

[9] *Mimeo*, at 3.

[10] *Arkansas Louisiana Gas Company* v. *FERC*, D.C. Cir. No. 77-1146.

[11] Order issued May 18, 1979, mimeo, at 6.

(1) whether the Commission possesses some special expertise which makes the case particularly appropriate for Commision decision;

(2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and

(3) whether the case is important in relation to the regulatory responsibilities of the Commission.[12]

After reviewing these three factors in the context of the instant case, the Commission concluded that the assertion of jurisdiction was unnecessary. In its discussion, however, the Commission expressed the view that the Louisiana Supreme Court's award of damages for the 1961-1972 period violated the filed rate doctrine.[13]

Thereafter, the Hall group filed its application for a waiver of the notice requirements prescribed in Section 4(d). Arkla submitted a response and protest to the application on June 8, 1979. The Hall group filed a reply to Arkla's response on June 13, 1979.

POSITIONS OF PARTIES

The Hall group filed its request conditionally, contending that a waiver of the filing requirements is not necessary since Section 4(d) has no applicability to a judicial award of damages for breach of contract. The Hall group then contends that if a waiver is required, principles of law and equity establish that a waiver is justified. The Hall group argues that the only reason that it failed to comply with the notice provisions of Section 4(d) was because Arkla

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[12] *Id.*

[13] *Id.* at 10, n. 18.

wrongfully concealed from the Hall group the royalty payments which Arkla was making to the United States.

Arkla asserts that the requirements of Sectior 4(d) apply to the court-awarded damages because such damages are merely the additional prices to be paid under the 1952 contract, as interpreted by the courts of Louisiana. Arkla further asserts that the filed rate doctrine absolutely precludes the Hall group from collecting any damages for the period prior to October, 1972. Arkla also denies any allegations of wrongdoing on its part, and argues that the Hall group is simply seeking a windfall at the expense of the consumer.

DISCUSSION

The Commission has before it two issues: (1) does Section 4(d) of the Natural Gas Act apply to the matter of damages awarded to the Hall group for the 1961-1972 period? and (2) if so, is there good cause to grant waiver of Section 4(d) in this case and, further, accept the rates filed by the Hall group. Both of these questions involve the scope of and reasons for the filed rate doctrine.

A. *Applicability of Section 4(d)*

We address first the contention of the Hall group that Section 4(d) is inapplicable here. Citing *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), *appeal dismissed* and *cert. denied*, 409 U.S. 1052 (1972) and *Cities Service Gas Company* v. *FPC*, 535 F.2d 1278 (D.C. Cir. 1976), the Hall group argues that a court award of damages for breach of contract is an entirely "separate and independent" issue from the question of rate obliga-

tions imposed by Sections 4 and 5 of the Natural Gas Act.

Section 4(d) of the Natural Gas Act provides that a natural gas company shall not change its rates without 30 days' notice to the Commission, unless the Commission shall, for good cause shown, waive this requirement. There is no question that had Arkla given the Hall group the notice of the government royalty payments that the Louisiana courts held Arkla was required by contract to give, the Hall group would have been required to comply with Sections 4 and 5 of the Natural Gas Act in seeking to charge the higher rate. The question, then, is whether consideration of the matter in the context of a state court contract action (involving rates for past sales) takes the matter outside the purview of the Natural Gas Act. The Louisiana Supreme Court held that it does. We disagree.

State courts—and Federal courts as well—may have a wide variety of actions between natural gas companies and their customers brought before them. Obviously, not all damage awards are barred by the Federal preemption and the assignment of regulatory responsibility to this Commission, but some are. To pick the two extremes, damages for an automobile accident between an Arkla vehicle and a Hall group vehicle are not barred, but an order in a state court action on a contract purporting to set the rate for prospective sales of natural gas in interstate commerce is barred. We believe that this case is merely the latter example presented in slightly different form, and that the policy considerations underlying the statutory and common law establishment of the filed rate doctrine dictate the conclusion that the Natural Gas Act applies to Louisiana's award of damages to the Hall group for the 1961-1972 period.

The filed rate doctrine has at least two aspects and policy bases, both of which are pertinent here. The first is the need for certainty as to the rates and other terms governing a regulated transaction. The Congress lodged exclusive jurisdiction in this agency to regulate sales of natural gas in interstate commerce, and provided in Section 4(c) of the Natural Gas Act that rates and charges for such sales be kept on file with this Commission. Section 4(d) provides that rates for such sales may not be changed without thirty days' notice to the Commission. These provisions have the effect of giving certainty to both buyers and sellers of natural gas in the interstate market, since only the rate filed with the Commission may be charged.

A second aspect to the filed rate doctrine is that it ensures that the rates charged for natural gas in interstate commerce are, in the words of Section 4(a) of the Natural Gas Act, "just and reasonable". As the courts have repeatedly held, the determination of a just and reasonable rate is a matter requiring expert judgment, and the statute gives the Commission "exclusive powers . . . to determine what those rates are to be." *Montana Dakota* v. *Northwestern Public Services Co.*, 341 U.S. 246, 250 (1951).

In the case before us, the effect of the Louisiana Supreme Court's holding is to permit the collection of a rate different from and higher than the rate the Hall group had on file with the Commission, and to permit the collection of this higher rate without the Commission's having determined that the different and higher rate is just and reasonable.

The Louisiana Supreme Court appears to have recognized in some respects that the award to the Hall group has the effect of increasing the rate for gas sold during the 1961-1972 period above the rate

on file during that period, but the Court applied Article 2040 of the Louisiana Civil Code to "consider fulfilled" the Section 4(c) filing requirement. 368 So. 2d at 990. But state law cannot be a legitimate basis for relieving a natural gas company of an obligation under the Natural Gas Act. What is more, the effect of the Louisiana decision is to undo the certainty of the applicable rate discussed above.

The Louisiana Supreme Court did not directly confront the question of whether it was making a just and reasonable rate determination and thus overstepping its authortiy. Rather, the Court reasoned that it was only attempting to remedy a contract breach, and that it was speculating about the Commission's likely response to a timely filing by the Hall group only for the purpose of calculating the damages that the Hall group probably suffered as a consequence of Arkla's breach. While we do not question the adequacy of this reasoning under Louisiana law, we believe the damage award constitutes a rate increase without the Commission's having determined that the new rate is just and reasonable, to the detriment of the Federal statutory scheme. Simply put, if the mere fact that a state court may have concurrent jurisdiction over a contract is sufficient to take all disputes that might arise under the contract, and all possible remedies that might be found for breach of the contract, outside the scope of the Natural Gas Act, then the certainty as to rates that results from the filing requirements in Section 4(c) and 4(d) of the Natural Gas Act is lost, and the Commission's exclusive jurisdiction to determine just and reasonable rates for interstate gas is rendered meaningless.

The case most closely on point is *Montana-Dakota, supra.* Although the question at issue in *Montana-*

Dakota was somewhat different, since the case arose when plaintiff sought damages grounded in fraud in a federal district court, there is much in *Montana-Dakota* to provide guidance here. In particular, the court stated (341 U.S. at 251) that "[petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." [14] Thus, the most the Louisiana courts were empowered to do in this circumstance as to the 1961-1972 period was to construe the contract (the Commission having disclaimed primary jurisdiction) and reach the conclusion that under the contract the Hall group was entitled to file a rate increase application with the Commission.

Cities Service is not to the contrary. There the court found that Cities Service had breached its contractual obligation to cooperate with Western in an abandonment proceeding before the Commission. Accordingly, *Cities Service* was ordered to pay damages

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[14] Mr. Justice Jackson, speaking for the majority, stated later in the opinion (341 U.S. at 252) that "if the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act." As we have noted (fn. 5 *supra*), the Louisiana courts were unable, on the record before them, to find such active fraud or deceit. Thus we do not believe that, in this instance, the Louisiana courts have the authority to authorize a price other than the filed rate for natural gas sold in interstate commerce. However, this Commision, in determining whether good cause exists for waiver of the notice requirements of Section 4(d), may take into account and attribute appropriate weight to the withholding from the Hall group of the information necessary for the Hall group to determine that it was entitled under the contract to file a rate increase application with the Commission.

to compensate Western for the money Western had lost as a result of its inability to market its gas elsewhere. Thus, in *Cities Service*, there was no dispute between the parties regarding the proper interpretation of the price terms of their contract. Unlike the instant case, the damages awarded in *Cities Service* did not constitute additional monies reflecting a putative increase in the price at which gas had been sold in past transactions.[15] Accordingly, the litigation in *Cities Service* had no impact upon the Commission's obligation to ensure that interstate sales

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[15] Put another way, the award of damages in *Cities Service* did not consist of the difference between the Commission-determined just and reasonable rate for Western's sales to Cities service and an alternative price for the same gas sold and bought by the same parties, based upon an assumption that the Commission somehow would have found the alternative price, rather than the filed rate, to be just and reasonable. As the court stated in Cities Service (535 F.2d at 1287):

> [T]he Oklahoma courts and the FPC were confronted with separate and distinct issues—the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the natural gas act to pay the just and reasonable rate for gas served and delivered to it . . . .

By contrast, in the instant case the Louisiana courts have, in effect, determined a rate that, in their view, should have been the just and reasonable rate—a determination that is within this Commission's *exclusive* jurisdiction. *See Montana-Dakota, supra.* The *Cities Service* decision (535 F.2d at 1287) lists a number of other factors, in addition to the price of the gas as sold to Western, that the Oklahoma court took into account in determining damages. In the instant case, there are no factors other than the difference between the filed rate and the rate the Louisiana courts thought appropriate under the contract.

of gas are made in accordance with the rate and filing requirements prescribed in Sections 4 and 5.

B. *Merits of Hall's Request for Waiver of Section 4(d)*

This holding does not, however, end the inquiry. The Hall group has asked in the alternative that we waive the filing requirements of Section 4(d) for good cause so as to give effect to the Louisiana court's finding on the contract as of 1961.

In the circumstances of this case, we are unable to conclude that good cause exists to waive the Section 4(d) filing requirements. The basis for our view that waiver would be inappropriate is the long-established "statutory bias" against retroactive rate increases.[16] What makes the rate increases in this case particularly unacceptable is the uncommonly severe nature of the retroactivity proposed. Hall is here attempting to expose consumers to a potential liability for higher rates beginning in 1961 and continuing for some 11 years thereafter. This we simply cannot sanction.

We are also very concerned about the possible unsettling effect that a waiver in this case might have on other gas purchase transactions. If the Hall group is granted a higher rate for its gas effective in 1961, there is a strong likelihood that claims would arise asserting that this increase triggered the operation of indefinite price escalator provisions[17] in other

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[16] *Gillring* v. *FERC*, 566 F.2d 1323, 1325 (5th Cir., 1978) describing the effect of the filed rate doctrine.

[17] In 1961, the Commission outlawed most indefinite pricing provisions in newly-executed contracts. Such provisions in existing contracts, however, could continue to operate. Order No. 232, 25 FPC 379 (1961); *The Pure Oil Company*, 25 FPC 383 (1961).

contracts in the Sligo Field geographical area, quite possibly involving pipelines other than Arkla.[18] This, of course, would open the door to additional rate increase requests and requests for waiver for the same period. As a matter of policy, we do not believe it is in the public interest to take actions in the name of equity that have the potential for reopening transactions which took place almost 20 years ago. The potential impact of such reopenings on our regulatory responsibilities appears substantial.[19]

Finally, we confess that we are at least troubled by the prospect of speculating as to what the Commission would or would not have done in 1961 had it been confronted at that time with a rate increase filing by the Hall group. The filing would, of course, have been based upon the Hall group's contention that a royalty payment activated its favored nations clause. Since a question of contractual authorization for the rate increase would have arisen, the Commission, we believe, would almost certainly have either suspended or rejected the filing.[20] Whether the Commission in

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[18] Our records indicate that there may be a number of contracts so affected. Some contracts signed by other pipelines contain clauses which are triggered upon the payment of a higher price by any buyer in a geographical area.

[19] We declined to assert our primary jurisdiction in the May 18, 1979 order in large part because we perceived no significant effect upon our regulatory responsibilities resulting from an interpretation of the favored nations clause favorable to the Hall group. Had we not believed that the filed rate doctrine banned a rate increase (through damages) for the 1961-1972 period, we no doubt would have had serious misgivings about declining jurisdiction over the question of contract interpretation.

[20] The Louisiana Supreme Court assumed that the Commission would have accepted the filing, based upon the November 8, 1976, order of the FPC. 368 So.2d at 991. How-

1961 would have provided a forum for resolving the contractual dispute is a question we cannot answer definitively; under the grounds asserted by the FPC in 1976 for disclaiming primary jurisdiction over the contract interpretation question and under the different grounds adopted by the Commission in its May 18, 1979, order, the Commission would have taken jurisdiction over the contract interpretation in 1961. At that time, the Commission might well have concluded that the favored nations clause was not triggered. More importantly, even if the Commission in 1961 had reached the same contractional interpretation as the Louisiana court, the Commission might have determined that the public interest would not permit the grant of rate increases based upon the triggering of favored nations clauses even in existing contracts.[21]

We recognize the determination of the Louisiana courts that the Hall group did not file for a rate increase in 1961 because Arkla withheld from the Hall group information that the Louisiana courts found Arkla was required to give the Hall group, and we realize that as between the Hall group and Arkla, the equities are favorable to the Hall group. But the Louisiana courts did not find active fraud or deceit in this withholding of information, and our own review of the record before us leads us to con-

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ever, neither the FPC in 1976 nor the Commission today purports to declare what the FPC's actions would have been in 1961.

[21] As we have already noted, the Commission acted in 1961 to outlaw indefinite pricing provisions and deny effect to newly-executed contracts. If the Commission had extended this policy to such clauses in existing contracts, it might have done so only where government royalty payments were involved; or it might have done so across-the-board.

clude that Arkla could have reasonably assumed that the government royalty payment did not trigger the indefinite price escalator in the contract with the Hall group. More importantly, as is discussed at some length above, we must place this particular case in the context of our broader regulatory responsibilities. And on balance, after considering the matter in this broader context, we cannot accept the potential for disruption of natural gas markets or the speculation as to how our predecessors would have acted nineteen years ago. Therefore, we deny waiver.

In summary, we find that good cause does not exist to waive notice provisions of Section 4(d). Accordingly, the Hall group's application will be denied.

The Commission orders:

The Hall group's request for a waiver of the filing requirements prescribed in Section 4(d) of the Natural Gas Act is denied.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

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